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SURFACE TRANSPORTATION BOARD

DECISION

STB Section 5a Application No. 118 (Sub-No. 2), et al.[1]

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.

Decided: March 21, 2003

On reconsideration, Board affirms, with minor modifications, its decision subjecting its continued approval of motor carrier rate bureau agreements to a condition requiring carriers to furnish a "truth-in-rates" notice and a condition barring use of a loss-of-discount penalty for late payment.

BY THE BOARD:

Under 49 U.S.C. 13703, motor carriers may discuss and set prices collectively without being subject to the antitrust laws when they act pursuant to a "rate bureau" agreement that we have approved under a broad public interest standard. In 1997, in response to provisions of the ICC Termination Act of 1995, we began this proceeding to consider whether, and under what conditions, to continue the approval of existing motor carrier rate bureau agreements. Our primary concern about the

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[1] This decision embraces the following other motor carrier bureau applications: Pacific Inland Tariff Bureau, Inc. - Renewal of Agreement, Section 5a Application No. 22 (Sub-No. 8); The New England Motor Rate Bureau, Inc., Section 5a Application No. 25 (Sub-No. 9); Middlewest Motor Freight Bureau, Inc. - Renewal of Agreement, Section 5a Application No. 34 (Sub-No. 10); Niagara Frontier Tariff Bureau, Inc., Section 5a Application No. 45 (Sub-No. 16); Southern Motor Carriers Rate Conference, Inc., Section 5a Application No. 46 (Sub-No. 21); Motor Carriers Traffic Association - Agreement, Section 5a Application No. 55 (Amendment No. 2); Machinery Haulers Association Inc. - Agreement, Section 5a Application No. 58 (Sub-No. 4); Rocky Mountain Tariff Bureau, Inc., Section 5a Application No. 60 (Sub-No. 11); Nationwide Bulk Trucking Association, Inc. - Agreement, Section 5a Application No. 63 (Sub-No. 4); Western Motor Tariff Bureau, Inc. - Agreement, Section 5a Application No. 70 (Sub-No. 12); and Willamette Tariff Bureau, Inc. - Renewal of Agreement, STB Section 5a Agreement No. 116 (Sub-No. 1).

motor carrier collective ratesetting process was that the "class" rates set collectively through the rate bureaus are set at artificially high levels in order to serve primarily as the basis for rate discounting. Our efforts have been directed at ensuring that this collective ratesetting process not skew market pricing or mislead shippers as to the rates prevailing in the market.

Ultimately, by decision served on November 20, 2001 (2001 Decision), we decided to condition our continued approval of the rate bureau agreements in these proceedings in two ways. First, we required that, when bureau-member carriers list or quote a rate that is based on or references a bureau-set class rate, the carrier must give the potential shipper a "truth-in-rates" notice that prominently discloses the range of discounts provided to shippers by bureau members. Second, we required, as a condition of rate bureau membership, that member carriers not apply a loss-of-discount penalty for late payment that references or is linked in any way to a bureau-set class rate.

Various rate bureaus have sought reconsideration of that decision.[2] They raise several arguments: that we did not provide adequate notice in advance that these particular conditions would be imposed; that the conditions are inappropriate and impractical; and that the conditions should not apply to particular bureaus. The National Small Shipments Traffic Conference, Inc. (NASSTRAC), a shipper organization, also petitioned for reconsideration, arguing that the conditions do not go far enough in protecting shippers. Replies were filed by EC-MAC, Middlewest/Pacific, Southern, NASSTRAC, the National Industrial Transportation League (NITL), the Halogenated Solvents Industry Alliance, Inc. (Halogenated), and Transportation Consumer Protection Council, Inc. (TCPC).[3]

After reviewing the petitions and responses, we have decided to adhere, with minor modifications, to the two conditions imposed in our 2001 Decision.

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[2] Petitions for reconsideration were filed by: EC-MAC Motor Carriers Service Association, Inc., jointly with the Niagara Frontier Tariff Bureau, Inc., and the Rocky Mountain Tariff Bureau, Inc. (EC-MAC); Middlewest Motor Freight Bureau, Inc., jointly with the Pacific Inland Tariff Bureau, Inc. (Middlewest/Pacific); Southern Motor Carriers Rate Conference, Inc. (Southern); and the Western Motor Tariff Bureau, Inc. (Western).

[3] TCPC adopted NASSTRAC's reply.

DISCUSSION AND CONCLUSIONS

I. The Advance Notice Issue.

In various earlier decisions in this proceeding,[4] we reviewed conditions prevailing in the trucking industry and concluded that the existing collective ratesetting process is not in the public interest, given the artificially high nature of the collectively set class rates. We announced our intention not to renew approval of rate bureau agreements unless the rate bureaus reduced their class rates to market levels, either by initiating a broad rate rollback or by adopting automatic minimum discounts. The rate bureaus, however, objected to such measures; the comments did not provide a basis upon which we could determine the market levels to which class rates should be "benchmarked" or at which minimum discounts should be set; and even some shippers expressed concern that broad rollbacks in class rates could disrupt existing business relationships. Moreover, we became convinced that imposing mandatory discounts could be viewed as, in effect, an impermissible prescription of rates.

Therefore, we decided to adopt different measures—the truth-in-rates notice and the loss-of-discount prohibition—as alternative means of achieving the same objective: ensuring that the collective ratemaking process does not skew market pricing or mislead shippers as to the rates prevailing in the market. We did not regard adopting this alternative remedial measure as charting a new course for which we should provide separate advance notice and an opportunity for comment.[5] We simply adjusted our remedial measures in light of the comments we had received. See Association of Oil Pipe Lines v. FERC, 83 F.3d 1424, 1432 (D.C. Cir. 1996); Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

Several rate bureaus nevertheless argue that we did not provide adequate advance notice of either the truth-in-rates requirement or the loss-of-discount condition. However, in proceedings governed by the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553, notice is sufficient if the final "rule" adopted by an agency is the logical outgrowth of the proposed rule on which it sought comment. Fertilizer Institute v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991). We believe that each of the conditions that we imposed was a logical outgrowth of the earlier notices we had provided. Although the truth-in-rates condition differs from a rate rollback or a mandatory minimum discount, we see it as a less invasive means of achieving the same goal: to ensure that shippers

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[4] This proceeding was instituted by decision served May 20, 1997 (1997 Notice, published at 62 FR 27653). Other decisions were served December 21, 1998 (published at 3 S.T.B. 926); February 11, 2000 (2000 Decision); and November 20, 2001 (2001 Decision).

[5] Although we are not promulgating rules in this proceeding, we have published notices in the Federal Register to solicit public comments.

(especially unsophisticated or infrequent shippers) do not unknowingly pay unrealistically high bureau-set class rates. Similarly, barring the use of a loss-of-discount provision, which was suggested in the comments of shipper interests in an earlier round of this proceeding,[6] and which was addressed at some length by the bureaus in response, prevents use of the rate-bureau process to skew market pricing.

But, even if these conditions do not fall within the "logical outgrowth" principle, any notice deficiency has been cured. The 2001 Decision was served on every rate bureau and on all of the shipper interests that have participated in this proceeding, giving them full notice of these alternative measures. The petitions and replies effectively constitute an additional round of comments directed specifically at the two new conditions. In this decision, we consider these recent comments and modify and clarify the two conditions. Thus, interested entities have now had the opportunity to submit comments and have them considered. See National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1094, 1121 (D.C. Cir. 1984) (further agency review rendered harmless a prior lack of notice).[7]

II. The Truth-In-Rates Notice Requirement.

A. The Public Interest Purpose Served by the Notice. We adopted the truth-in-rates notice requirement to ensure that occasional or uninitiated shippers are not misled into thinking that class rates are the "going rates" under which most traffic moves. The rate bureaus have asked us to reconsider the notice condition, which they argue would serve no meaningful purpose. The commenters that represent shippers, however, uniformly praise the notice requirement as "promot[ing] the public interest by ensuring that shippers receive sufficient information to negotiate market-based rates for their traffic." NITL Reply at 10. The occasional or uninitiated shipper might mistakenly assume that class rates are the prevailing rates within the industry, and it might even assume that such rates are somehow government sanctioned. To such a shipper, an advertised 10 percent discount might sound like a good deal, but the truth-in-rates notice would alert the potential shipper that rates are not uniform, that larger

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[6] See Opening Comments of NASSTRAC (jointly with another shipper association), filed April 11, 2000.

[7] Some of the rate bureaus have asked us to delay until at least the end of 2004 — after the conclusion of the 5-year statutory review period set up in Section 227 of the Motor Carrier Safety Improvement Act of 1999 (Safety Act), Pub. L. No. 106-159, 113 Stat. 1748 (Dec. 9, 1999) and codified at 49 U.S.C. 13703(c)(2) — the imposition of any new conditions on approval of their agreements. See, e.g., EC-MAC Bureaus Reply at 2. In our 2001 Decision, at 3, and in our 2000 Decision, at 4-5, we rejected rate-bureau arguments that Congress wanted us to maintain the status quo for the duration of the new 5-year review period. Delaying these conditions would simply perpetuate practices that we believe contravene the public interest. The requests for further delay will therefore be denied.

discounts may be available, and that it should shop around to determine the best rate available for its shipment(s).

As both the rate bureaus and the shipper organizations recognize, a bureau member need not provide the truth-in-rates notice when it quotes a rate without reference to a class rate. But in that case, the harm we see from artificially high class rates would be avoided: a shipper would have no basis to assume that the price quoted reflects a uniform or prevailing rate level. The shipper would know that, to determine the prevailing rate level for its shipment(s), it would need to comparison-shop by contacting other carriers for rate quotes.

The rate bureaus contend that the notice would itself be misleading because the range-of-discount information would include discounts offered by other carriers and discounts intended for very different transportation situations. They fear that a shipper would wrongly assume that it should receive the maximum discount. EC-MAC Petition at 9-12, 15-16. See also Middlewest/Pacific Petition at 11-12. But the notice would not state or imply that any particular traffic should or would move under any particular discount. Rather, the notice would simply inform that wide ranges of discounts are available from members of the rate bureau to which the quoting carrier belongs. If the notice leads a shipper to initiate a dialogue about the appropriate rate level for its traffic, then the notice will serve the salutary purpose of ensuring that shippers are better aware of the rates prevailing in the market. We have no doubt that carriers will be able to explain to shippers the sorts of basic economic and pricing principles that EC-MAC describes in its Petition (at 11): that volume shipments are more deeply discounted than smaller shipments, that traffic in high-density lanes receives bigger discounts than traffic in low-density lanes, and so forth. The point of the notice is simply that *all* shippers should be informed that discounts of varying sizes may be available, so that they may explore (and potentially influence) whether any discount they have been offered is appropriate.[8]

B. Competitive Disadvantage Argument. EC-MAC claims that the required truth-in-rates notice would put bureau members at a competitive disadvantage for two reasons: it would somehow

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[8] EC-MAC also asks that we not require that reports submitted to us include "particularized information on each member carrier's discounts." Petition at 16. Indeed, carrier-specific information is not required. Rather, each bureau must determine the upper and lower range of the percentages of discounts from class rates that have been provided to shippers over the past year by all of its member carriers, as a group. It must supply that aggregate information to us and to shippers or other interested parties, on whom we will rely (see 2001 Decision at n.23) to spot any discrepancies based upon their experience as to the highest or lowest discounts offered to them by the members of a particular bureau. The requirement that the bureaus supply upon request the "underlying information" (id. at 12) used to recalculate the range of discounts each year does not require the bureau to identify specific carriers, and thus our process should not result in dissemination of commercially sensitive information.

give shippers the false impression that the rates of bureau members are higher than those quoted by nonmembers (Petition at 13-14); and nonmembers would not have to give the notice that bureau members have to give, even when they offer the same kind of rate quotes[9] (id. at 18). We do not find these arguments persuasive.

First, we fail to see how the disclosure called for by the truth-in-rates notice would make the rates of bureau-member carriers appear higher than the rates of non-member carriers if they are not in fact higher. To be sure, the notice could induce a shipper to shop around (among both member and non-member carriers), but if the member carrier has offered a better rate and comparable service, it should obtain the traffic. Indeed, any shipper that has received a truth-in-rates notice from a bureau member might well come to appreciate the openness provided by the notice and come to view with suspicion non-member carriers that are unwilling to give comparable information.

Thus, the requirement of a truth-in-rates notice may promote openness even on the part of carriers that are not members of rate bureaus. But even if such carriers—over whose rates we have no regulatory authority—fail to provide equivalent notice, the answer is not to promote a broad policy of ignorance stemming from misleading class rate structures. Our responsibility is to protect the public interest with respect to matters within our authority. As NITL succinctly observes (Reply at 13-14), if a member carrier wishes to be free from the obligation to give the truth-in-rates notice, it may leave the rate bureau and be subject to the same antitrust laws that govern non-members.

C. Suggested Changes to the Notice Requirement. Apart from their objections to requiring their members to provide the truth-in-rates notice, the bureaus have raised questions concerning, and suggested various changes to, the mechanics of the notice.

1. Circumstances Requiring the Notice. Middlewest/Pacific suggests that the notice should be required only when a carrier offers an undiscounted bureau-set class rate. It argues that shippers receiving rate quotes that include a discount do not need to be informed of the existence of discounts. Petition at 11. But, as NASSTRAC points out (Reply at 7), carriers could easily circumvent the notice requirement simply by quoting a nominal discount, and the shippers would not be

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[9] As EC-MAC points out, bureau-set class rates are public information that is readily available to nonmembers through such avenues as Southern's Czar-Lite computer program. Petition at 8. Indeed, even a carrier that is a member of a rate bureau may obtain information regarding other bureaus' class rates through such avenues and then quote discounted rates based on that information. But when they do, the member carrier must provide a notice of the range of discounts available either from that other bureau (if known) or from members of its own bureau. The important thing is for the shipper to be informed regarding the breadth of discounting off class rates by motor carriers that collectively set class rates.

aware of the range of discounts available among bureau members. Indeed, that is why we did not accept the arguments that several of the bureaus presented earlier, and that they continue to press now (e.g., EC-MAC Reply at 4), that programs offering a standard 35% discount for shippers that have not been offered some other discount sufficiently address our concerns about the artificially high level of class rates. See, e.g., 2000 Decision at 8 & n.17; 2001 Decision at 7-8 & n.13. Thus, we will not alter the notice requirement in the manner suggested by Middlewest/Pacific.

Several bureaus suggest that the notice should not be required when a carrier orally quotes rates. Middlewest/Pacific Petition at 10; EC-MAC Petition at 18. NITL responds that, if notice were required only for written and electronic rate quotes, carriers would be able to bury the notice information in documents that "shippers are unlikely to read, much less understand." Reply at 15. We agree. As an example, suppose that a small business owner with no experience in securing transportation services needs to hire a motor carrier to transport a large piece of equipment to its facility. This shipper might well telephone a motor carrier, receive an oral rate quote of 5% off the "usual rate," accept that rate orally, and never learn about the widespread existence of discounting from "the usual" (above-market) class rates until it received a written document that included the truth-in-rates notice, by which time it could be too late to shop around for a better rate. This example illustrates the importance of applying the notice to quotes given orally, as well as those given in writing or electronically. Thus, when a member carrier quotes rates orally, the truth-in-rates notice must be given orally at the same time.

The bureaus also contend that, in the back-and-forth context of rate negotiations, a carrier should not have to give the same notice to the same shipper repeatedly. Some of the bureaus suggest that carriers should be required to give the notice only when quoting rates for the first time to a new customer. EC-MAC Petition at 17-18. But the range of discount information, which is useful to shippers, presumably will change every year. And a one-time notice requirement would not ensure that the party representing a shipper at a future date would be aware of all information given to a different employee of the shipper at an earlier date. Therefore, we will not accept the suggestion that a carrier need give the required notice to a customer only once. However, to avoid needless repetition in the midst of ongoing negotiations concerning a particular rate for a particular shipment (or set of shipments), we clarify that the carrier need not repeat the notice to the same representative of the shipper about that particular shipment (or set of shipments).

2. NASSTRAC's Petition. As we noted in our prior decisions, several of the bureaus have adopted automatic discount programs in response to shipper objections to general increases in the class rate levels. EC-MAC, Middlewest/Pacific, and others have collectively set rules providing for a 35% discount off the class rate for any shipper that has not been given some other discount. Southern established a 20% "default" discount rule. While supporting the truth-in-rates notice condition, NASSTRAC argues that to adequately protect smaller shippers we should also require the rate

bureaus to keep these discount programs in place as a condition of rate bureau approvals. As we have explained (2001 Decision at 8), however, requiring specific minimum discounts could be viewed as prescribing rates, which is not our role or intent.

Alternatively, to isolate "outlier" discounts, NASSTRAC asks us to expand the truth-in-rates notice by requiring bureau members to identify not just the range, but also the distribution of discounts offered by all members of the bureau. But while it is practicable for us to require bureaus to identify the outer ranges of the discounts offered by their members, carriers do not, as far as we know, routinely keep information on the distribution of the discounts they have negotiated with shippers, and thus NASSTRAC's approach would involve a substantial burden on carriers. Because the truth-in-rates notice itself should motivate a shipper to shop around, we will not require rate bureaus (and their members) to take the additional, burdensome step of calculating, and giving notice of, the distribution of the discounts the carriers have negotiated.

D. Exemptions for Specific Bureaus. Southern renews its argument that it should be exempt from the truth-in-rates condition because its rate setting process is different, and its class rate structure is lower, than that of other bureaus or of individual, nationwide carriers. We appreciate Southern's efforts to be innovative and forward-looking, but as its member carriers offer discounts from class rates just like the members of the other bureaus, it ought not be exempted from the notice requirement.

Western states that the bulk of the traffic handled by its member carriers involves, under Western's Tariff WMT 500, joint motor-water movements in the "noncontiguous domestic trade" between the United States mainland and Hawaii. Western's members use the collectively established joint and proportional class rates published in Tariff WMT 500 to negotiate, with water carriers and with shippers, their joint motor-water rates. Under the law, the rates for this trade, when finally set, must be filed with us, see 49 U.S.C. 13702(a) - (b), may not be discounted outside of the tariff, and can be challenged as unreasonable, see 49 U.S.C. 13701.[10] Western's members also provide largely unregulated motor carriage between the United States and Mexico under what Western describes as negotiated rates that do not involve discounting from class rates. Finally, although Western does not explicitly say so, its members appear to provide some amount of motor carrier service within the United States where no water movement is involved, which may involve the type of discounting from class rates practiced by motor carriers in other bureaus.

We will not require the truth-in-rates notice when there is no possibility of a discount from the class rate. When Western's members list or quote a rate that is for the Hawaii trade or for the United

[10] Rates solely for motor carriage services between points in the United States, by contrast, are not filed with the agency, and are subject to review on reasonableness grounds only if they are established by collective action. See 49 U.S.C. 13701(a)(1)(C).

States-Mexico trade, if there is no possibility of the carrier offering or negotiating a discount from bureau-set class rates, the members need not provide the truth-in-rates notice. When, however, Western members list or quote a rate for motor carrier transportation within the United States that does not also involve water carriage, and when the rate is expressed as a discount or percentage off a class rate that was set collectively, the members must provide the truth-in-rates notice.

III. The Loss-of-Discount Condition.

A. Challenges to the Condition. To ensure that shippers are not harmed in any way by the artificially high level at which class rates are set, we imposed as a condition of rate bureau membership a prohibition against using a collectively set class rate as the basis for a loss of discount. We noted that under the credit regulations adopted by the former Interstate Commerce Commission and now administered by the Federal Motor Carrier Safety Administration (FCMSA), while carriers are permitted to adopt reasonable procedures to recover collection costs incurred in connection with overdue charges, they are not entitled to use such credit procedures for unjust enrichment.[11]

The rate bureaus renew their argument that our condition relating to loss-of-discount penalties impermissibly invades the authority of FMCSA.[12] As we explained in our 2001 Decision (at 11), however, supervision of rate bureaus' activities under agreements that we approve is our responsibility. Bureau members are not precluded from imposing other permissible reasonable late-payment charges

[11] For an example of how late-payment penalties are reportedly being applied, see Traffic World, Vol. 266, No. 11, March 18, 2002, at 5 (describing a case in which a bankrupt motor carrier, upon the failure of an intermediary to timely pay a freight bill, is seeking to recover from a shipper the 72% discount originally negotiated, as well as liquidated damages in an amount more than twice the original freight bill, plus attorneys fees of 35%, with the ultimate effect of increasing the original freight bill by more than 700%).

[12] They also renew their argument that shippers have the right to adjudicate case by case whether a specific late-payment penalty is reasonable. But as we said in our 2001 Decision (at 11 n.21), that type of litigation is costly and inefficient, and as NITL points out (Reply at 17), many shippers will not be in a position to litigate loss-of-discount cases.

under the FMCSA regulations;[13] they simply will not be allowed to peg such charges to the class rates that are the product of the collective ratemaking process.

The bureaus also challenge the loss-of-discount prohibition as a violation of a carrier's right of independent action under 49 U.S.C. 13703(a)(4).[14] EC-MAC Petition at 18-19; Middlewest/Pacific Petition at 12-13. That provision precludes rate bureaus from inhibiting a member carrier's ability to establish its own rates and classifications.[15] As NASSTRAC points out (Reply at 9), however, the statutory right of independent action is not even implicated here, because it deals with a carrier's right to depart from a bureau's action, not the right to take an action that is the product of a collective activity. Section 13703(a)(4) does not preclude the Board from circumscribing the uses to which the product of collective action can be put by the members of a rate bureau.[16]

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[13] Our decision does not prevent carriers from taking advantage of other provisions of the FMCSA credit regulations by either (1) assessing liquidated damages established by rule that are expressed as a reasonable set dollar amount or as a reasonable set percentage of the unpaid freight bill, see 49 CFR 377.203(g)(1)(i); or (2) assessing collection charges through contract terms in a bill of lading, see 49 CFR 377.203(g)(3), so long as the carriers do not place a loss-of-discount provision in the bill of lading that would result in applying an undiscounted bureau-set class rate.

[14] Section 13703(a)(4) states:

> Any carrier which is a party to an agreement under paragraph (1) [authorizing motors carriers to enter into an agreement to establish rates and rules] is not, and may not be, precluded from independently establishing its own rates, classification, and mileages or from adopting and using a non-collectively made classification or mileage guide.

[15] See, e.g., Central & S. Motor Freight Tariff Ass'n v. United States, 843 F.2d 886, 888 n.2 (6th Cir. 1988); Rate Bureau Investigation, 351 I.C.C. 437. 459-60 (1976), aff'd sub nom. Motor Carriers Traffic Ass'n v. United States, 559 F.2d 1251 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978), aff'd on rehearing sub nom. All Island Delivery Service, Inc. v. United States, 565 F.2d 290 (4th Cir. 1977), cert. denied, 435 U.S. 1007, reh'g denied, 437 U.S. 911 (1978).

[16] We note that, prior to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, the statutory provision explicitly prohibited ***rate bureaus*** from violating carriers' right of independent action. See former 49 U.S.C. 10706(b)(3)(B)(ii) (1994) ("the organization [established or continued under an agreement approved under this section] may not interfere with each carrier's right of independent action and may not change or cancel any rate established by independent action . . . other than a general increase or broad rate restructuring. . . "). There is no indication in the law or

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Southern argues that it is not necessary to apply the loss-of-discount prohibition to its members because of Southern's lower class-rate structure. Whatever the level of its class rates, Southern's members offer substantial discounts, and therefore there is no basis for excusing it from the conditions applicable to the other bureaus. Western states that there are no loss-of-discount provisions established by its members as late-payment penalties for shipments in the mainland-Hawaii trade. But Western has not demonstrated that none of its carriers ever discount; therefore, its members must comply with the certification requirement. If discounting is not a significant part of any of its members' pricing, this requirement should be easy for its members to meet.

B. Alternative Bureau Rule Prohibiting Loss-of-Discount. Some of the bureaus suggest, as an alternative to the member certification requirement, that a rate bureau be permitted to establish a rule, adopted through the collective process, providing that collectively set class rates cannot be applied in connection with loss-of-discount provisions. EC-MAC Petition at 19; Southern Petition at 11. According to the bureaus, this rule would protect shippers in the event that a carrier tried to collect a bureau class rate as a loss-of-discount penalty, because the shipper could raise as a defense that the carrier did not comply with a binding rule of the bureau tariff.

We are concerned, however, that if such a rule were buried in a lengthy bureau rules document, it might not come to the attention of individual member carriers as immediately and forcefully as with a certification requirement. Therefore, while we have no objection to inclusion of such a provision in a rate bureau's rules, we do not regard such a bureau rule as a sufficient substitute for a bar to bureau membership if a carrier does not expressly agree to abide by the prohibition against using bureau-set class rates as a basis for a loss-of-discount late-payment penalty.

Thus, we will continue to require the bureaus to obtain from each member a confirmation that the carrier will not apply a loss-of-discount provision as a penalty.[17]

IV. Scope of the Decision.

We have issued several decisions in these matters over the past several years, and Congress has passed new laws that are relevant to these proceedings. See, e.g., supra note 7. Our action here is

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[16](...continued)
legislative history that the new wording of this provision was intended to limit the Board's authority. See H. Rep. No. 104-422, 104th Cong., 1st Sess. (1995) at 206-07, reprinted in 1995 U.S.S.C.A.N. 850, 891-92 (Conference Report).

[17] If they wish, the bureaus may obtain the requisite statement by using a check-off box on a form transmitted to the carrier and returned to the bureau, as suggested by NASSTRAC (Reply at 9).

intended to complete the process that we began when we instituted our review of the rate bureau process in 1997. Although the Safety Act established, prospectively, a new timetable for our periodic review of rate bureau agreements, the "savings provision" of section 227(c) of that law, now codified at 49 U.S.C. 13703(e)(2), expressly provided that the changes made to the periodic review duties for collective activities specifically do not apply to cases brought under the rate bureau provisions that were pending at the time the new law was passed.[18] Completion of this proceeding, which was brought under the rate bureau provision and was pending at the time the new law was passed, is consistent with and advances the intent of the savings provision. Therefore, if the bureaus comply with the conditions we have imposed, these proceedings will be discontinued, and their agreements will receive approval that will remain in effect until further order of the agency.

The provisions of 49 U.S.C. 13703(c)(2), adopted in section 227(a) of the Safety Act, establish an independent requirement that, during every 5-year period beginning with the period running through December 31, 2004, the Board shall initiate a proceeding to review all approved rate bureau agreements. Since this decision resolves a pending case (as contemplated in section 13703(e)(2)), we must initiate a new proceeding to comply with the statute.

CONCLUSION

1. Upon reconsideration, we find that, as clarified here, our continued approval of the rate bureau agreements listed in the title and in footnote 1 is made subject to the conditions that the members of those rate bureaus (1) give the truth-in-rates notice described here and in the 2001 Decision when they list rates or otherwise give a rate quote that references a collectively set rate; and (2) certify that they will not apply a loss-of-discount provision that would reinstate the collectively set rate as a penalty for late payment.

2. The rate bureaus are directed to submit the range-of-discount information discussed in this decision to the Board, with service on all parties to this proceeding, by May 27, 2003. The rate bureaus must submit to the Board revised agreements that conform to this decision, with service on all other parties, by July 25, 2003.

[18] See 2000 Decision at 4-5, 2001 Decision at 3.

3. This decision is effective April 26, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary